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In The
Supreme Court of the United States
October Term, 1985

M. GILDA MARQUES,
Petitioner,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Joseph D. Gebhardt
(Attorney of Record)
Beth Loewenstein Don
Dobrovir & Gebhardt
Suite 1105
1025 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 347-8118

Counsel for Petitioner

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EDITOR'S NOTE

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QUESTION PRESENTED

1. Does the Federal Circuit's decision below, providing for the Federal Government a low standard of proof ("substantial evidence"), to justify denying salary increases to government workers in a potential one-half million cases each year -- a decision that conflicts with the rulings of three other Circuits, which imposed a higher standard of proof ("preponderance of the evidence") in such cases -- do violence to Congress' carefully crafted statutory scheme for the administration of the Federal civilian work force of some three million employees?

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IN THE
SUPREME COURT OF THE UNITED STATES

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No. _____

M. GILDA MARQUES, M.D.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner M. Gilda Marques, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on August 1, 1985.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit appears as Appendix A at pp. 1a-13a. The final decision of the U.S. Merit Systems Protection Board, 22 MSPB 129 (1984), appears as Appendix B at pp. 14a-42a. The initial decision of the presiding official of the Merit Systems Protection Board appears as Appendix C at pp. 43a-59a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit was entered on August 1, 1985. A timely petition for rehearing *en banc* was denied on December 2, 1985 (Appendix D, pp. 60a-61a), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5:

§ 5335(c)

> When a [within-grade step increase] determination is made under subsection (a) of this section that the work of an employee is not of an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of the determination within his agency under uniform procedures prescribed by the Office of Personnel Management. If the determination is affirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection Board. If the reconsideration or appeal results in a reversal of the earlier determination, the new determination supersedes the earlier determination and is deemed to have been made as of the date of the earlier determination....

§ 7701(c)(1)

> Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision--

> (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.

STATEMENT OF THE CASE

Petitioner is a mid-level employee of the National Institutes of Health in the U.S. Department of Health and Human Services. She has been a career federal employee for 35 years. Throughout her career petitioner received performance evaluations of "satisfactory" or better, received promotions from time to time and received all her periodic "within-grade

step" pay increases[1] at the time she first became eligible for each one.

This case springs from the first denial of such a within-grade step increase in petitioner's government career. In this case, when petitioner became eligible for her next (and final) within-grade increase, her new supervisor ruled that her performance was not at "an acceptable level of competence"[2] despite her existing "satisfactory" evaluation; and hence the pay increase was denied.

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1 This type of pay increase is granted to reflect the Federal employee's increased seniority. Early in his or her career, the employee is eligible for such an increase every year. As the employee's career continues, the increase is available only every two years and then every three years, until the employee reaches the highest step, Step 10. *See* 5 C.F.R. Part 53 , Subpart D.

2 "Acceptable level of competence" means that the employee's performance is fully successful (i.e., rated "satisfactory" or better) during the period between the employee's last within-grade increase and the date the employee is eligible for the next increase. 5 C.F.R. § 531.403.

Petitioner pursued and exhausted her remedies at the agency, the Merit Systems Protection Board (the "MSPB")[3] and the Federal Circuit. At all levels her appeals of the supervisor's decision proved fruitless, because, following MSPB and Federal Circuit precedents,[4] the agency was required only to show "substantial evidence," not a "preponderance of the evidence," at the MSPB to support its ruling that petitioner's performance was not at an acceptable level.

The Federal Circuit's decision, ruling 2-1 in favor of the agency on August 1, 1985 (App. A, 1a-13a), reaffirmed its holding in earlier cases, *Romane v. Defense Contract Audit Agency*, 760 F.2d

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3 5 U.S.C. § 5335(c).

4 The Federal Circuit has had exclusive jurisdiction to review MSPB decisions since October 1, 1982. 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7703(b)(1), as amended. (*See* Pub.L. 97-164, Title I, §§ 127(a), 144, April 2, 1982, 96 Stat. 37, 45).

1286 (Fed. Cir. 1985); *Meyer v. Department of Health and Human Services*, 666 F.2d 540 (Ct. Cl. 1981), that the agency is to be held only to a "substantial evidence" standard at the MSPB.[5] It rejected, as it had before, the contrary decisions of three sister Circuits, *Schramm v. Department of Health and Human Services*, 682 F.2d 85 (3rd Cir. 1982); *Stankis v. Environmental Protection Agency*, 713 F.2d 1181 (5th Cir. 1983); *White v. United States Department of the Army*, 720 F.2d 209 (D.C. Cir. 1983), and *Ommaya v. National Institutes of Health*, 726 F.2d 827 (D.C. Cir. 1984). The *Schramm*, *Stankis*, *White* and *Ommaya* decisions hold that, to justify denial of a within-grade

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5 The MSPB defines "substantial evidence" in 5 C.F.R. § 1201.56(c)(1) as

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

increase, the agency is to be held to the higher evidentiary standard of "preponderance of the evidence."[6]

Petitioner asks this Court to review and reverse the decision of the Federal Circuit and remand this case to the MSPB, because:

-- it conflicts with the holdings of three other federal courts of appeals;

-- it is supported by no decision of any other federal court of appeals;

---

6 The MSPB defines "preponderance of the evidence" in 5 C.F.R. § 1201.56(c)(2) as

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

-- it was justified by the Federal Circuit exclusively on the basis of its own internal management rules,[7] and

-- as the decisions of the other Circuits make clear, it is contrary to the plain language of the statute reflecting the intent of Congress in a comprehensive, carefully crafted, extensively debated statutory revision of the scheme for man-

---

7 I.e., holding itself bound by precedents, however ill-conceived, of the old U.S. Court of Claims (*see infra* at pp. 19-23). Petitioner asked the Federal Circuit to review its decision *en banc*. It declined to do so, apparently preferring a rigid adherence to error to a correct holding of the law and ignoring Justice Holmes' aphorism:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

O. HOLMES, The Path of the Law, *Collected Legal Papers* at 187 (1921).

agement of the three million strong Federal Government civilian work force.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE WELL-REASONED CONTRARY DECISIONS OF THREE OTHER FEDERAL COURTS OF APPEALS; IS CONTRARY TO THE PLAIN INTENT OF CONGRESS AS EXPRESSED IN THE APPLICABLE STATUTE; AND RESULTED FROM A RIGID ADHERENCE TO AN INTERNAL MANAGEMENT RULE REQUIRING THE COURT TO FOLLOW AS BINDING OLD PRECEDENTS OF THE FEDERAL CIRCUIT'S PREDECESSOR COURT

A. The Federal Circuit Is in Conflict with Three Other Circuits Which Correctly Interpreted the Statutory Standard for MSPB Review of Within-Grade Appeals.

Before the Federal Circuit assumed exclusive jurisdiction over MSPB appeals in October 1982 (*see* 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7703(b)(1), as amended), the Third, Fifth and District of Columbia Circuits were called upon to decide what standard of review applies to Federal employee appeals of within-grade denials.

These three Circuits all ruled that the more rigorous "preponderance of the evidence" standard, rather than the more lenient "substantial evidence" standard, applies to MSPB review of such appeals.

In *Schramm v. Department of Health and Human Services*, 682 F.2d 85 (3rd Cir. 1982), a unanimous panel of the Third Circuit, reviewing the Civil Service Reform Act of 1978 (the "CSRA") and its legislative history, ruled that the higher standard, "preponderance of the evidence," governs MSPB review of within-grade appeals filed pursuant to 5 U.S.C. § 5335(c). According to *Schramm*, "[t]he plain language of [5 U.S.C.] § 7701(c)(1) suggests that Congress intended the MSPB to review adverse personnel decisions resulting in reductions in grade or demotion by the substantial evidence standard, since they are the only actions described in [5 U.S.C.] § 4303, and that every other

case must be reviewed by the higher standard prescribed in § 7701(c)(1)(B)." *Id.* at 87. The court concluded that while "[t]he legislative history reveals a substantial ambiguity in the standard of review Congress meant to be applied in cases such as Schramm's," the "statements in the [CSRA's] legislative history, read in context, refer specifically to removals or reductions in grade under § 4303, and not to performance-related cases generally" (which include within-grade appeals under § 5335(c)). *Id.* at 88, 89.[8] The *Schramm* court thus "decline[d] to rewrite the plain language of the Act, and h[e]ld that § 7701(c)(1) must be given its literal meaning." *Id.* at 88.

The Fifth Circuit agreed with the Third Circuit's *Schramm* ruling. It too con-

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8 Within-grade increases are nowhere mentioned in 5 U.S.C. § 4303. Rather, they are provided for and governed by 5 U.S.C. § 5335.

cluded that "the plain language of the statute controls" MSPB review of within-grade appeals. *Stankis v. Environmental Protection Agency*, 713 F.2d 1181, 1184 (5th Cir. 1983). After "carefully examin[ing] the legislative history of the Civil Service Reform Act that enacted these provisions, as well as the practical consequences of each competing interpretation," *id.* at 1184, the *Stankis* court, in a unanimous opinion, reasoned as follows:

> Title 5, Chapter 43 of the United States Code covers performance appraisal for government employees, and section 4303 therein sets out the action that an agency may take based on the unacceptable performance of its employees. It allows an agency to "reduce in grade or remove an employee for unacceptable performance." A denial of WGI [within-grade increase] is not listed in section 4303. It is covered instead under section 5335, which specifically discusses WGI's.

Id. at 1183 (footnote omitted).

The D.C. Circuit followed the *Schramm* and *Stankis* rulings in *White v. United States Department of the Army*, 720 F.2d 209, 211-12 (D.C. Cir. 1983), stating --

> The language of the statute seems clear: Paragraph (A) only applies to agency "action based on unacceptable performance *described in section 4303*" (emphasis added), and Section 4303 only refers to decisions to remove or reduce the grade of an employee. The section contains no reference to decisions denying an employee a within-grade step increase in pay. Those decisions are exclusively described in Section 5335. Thus, under the plain language of the statute, paragraph (B) and its preponderance of the evidence standard would govern.

The D.C. Circuit was also impressed in *White* that the MSPB's reliance on substantial evidence to sustain within-grade denials "not only contradicted clear statutory language but also the clear language

of MSPB's own regulations."[9] *Id.* at 213 (citation omitted).

For these reasons, the unanimous *White* court refused to allow the MSPB to "rewrit[e] the statute by applying the more flexible substantial evidence standard to *all* performance-based decisions, whether or not they are 'described in section 4303.'" *Id.* at 212.

The D.C. Circuit reaffirmed the standard of preponderance of the evidence in within-grade cases in *Ommaya v. National Institutes of Health*, 726 F.2d 827 (D.C.

---

9 The same regulations, found at 5 C.F.R. § 1201.56(a), remain in effect today:

> Burden and degree of proof. (1) Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the Board if:
>
> (i) I is brought under 5 U.S.C. 430 and is supported by substantial evidence; or
>
> (ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

Cir. 1984). *Ommaya* held that the MSPB's application of the wrong (substantial evidence) standard in such cases is not a "harmless error" which "would not have affected the result in the case." *Id.* at 830.

All in all, 12 court of appeals judges sitting in three Circuits, on four different panels, reached the unanimous decision that the plain language of the CSRA[10] and the absence of a contrary Congressional intent require the preponderance of the evidence standard in MSPB within-grade cases. These three courts, and these 12 judges, were the only judicial authorities other than the Federal Circuit and its predecessor court to decide this question.

Hence this case presents as clear an example as can be of the need for this

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10 The Federal Circuit does not disagree with the other three Circuits' interpretation of what the statute says on its face. (*See infra* at pp. 20-21).

Court's review to resolve a conflict in the Circuits. Sup. Ct. Rule 17.1(a). Admittedly absent here is the usual effect of such conflicts, i.e., the abhorrent prevalence of different rules of decision governing identical cases depending on where the case arose, and consequent forum-shopping. Since 1982, only the Federal Circuit has had jurisdiction of Federal employee cases on review from the MSPB. 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7703(b)(1), as amended. Thus, however erroneous and however much in disregard of its three sister Circuits, the Federal Circuit's ruling here does effect uniformity *in futuro*.

It is important, nevertheless, for this Court to resolve the conflict. The law is in disarray. Respect for the law suffers when the rule rigidly imposed by the court that has inherited exclusive power in the context is so effectively criticized and

disapproved by equally competent courts, and nothing has changed but consummation of the inheritance. Unless this Court grants certiorari, the conflict will have been resolved, not by this Court in fulfillment of its role as final arbiter of the law, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), but by a single Federal court, as the result of an accidental effect of Congress' distribution of appellate jurisdiction. Even worse: the Federal Circuit's resolution of the conflict was not by reasoned analysis and principled disagreement with the Third, Fifth and D.C. Circuits. (*See infra* at pp. 19-23). It was itself the accidental result of the Federal Circuit's internal management rule, adopting decisions of the defunct U.S. Court of Claims as its own precedents, even though the Court of Claims was not an Article III court and did not have exclusive but only concurrent

jurisdiction of MSPB appeals with all the Circuit courts of appeals, *see Meyer v. Department of Health and Human Services*, 666 F.2d 540, 542 n. 6 (Ct. Cl. 1981), *quoting* 5 U.S.C. former § 7703(b)(1).

In sum, this Court's considered reflection, not accident, should resolve a disputed rule of law that is as important as that at issue here. (*See infra* at pp. 24-38).

B. Without Analysis or Careful Consideration of its Own, the Federal Circuit Singly Adopted as Binding a Decision of its Predecessor Court, the Court of Claims, Promulgating a Review Standard for Within-Grade Appeals That Is Contrary to Statute, Despite Other Circuits' Subsequent Strong Criticism of That Old Decision.

Despite the unanimous rulings of three sister Circuits in *Schramm*, *Stankis*, *White* and *Ommaya*, and this Court's recent references to the CSRA's "exacting standards for the review of ... actions by the MSPB"

in *Lindhal v. Office of Personnel Management*, ___ U.S. ___, 105 S.Ct. 1620, 1624, 84 L.Ed.2d 674, 681 (1985), and to MSPB decisions based upon a showing of the "appropriate evidence" under 5 U.S.C. § 7701(c)(1), *Cornelius v. Nutt*, ___ U.S. ___, 105 S.Ct. 2882, 2884-85 (1985), the Federal Circuit has chosen to follow blindly the precedent of the old Court of Claims, its predecessor. That court implicitly admitted to rewriting Congress' standard of review for within-grade cases in *Meyer v. Department of Health and Human Services*, 666 F.2d at 545:

> ...[P]etitioner argues that a strict reading of section 7701(c)(1)(A) requires that the MSPB be guided by the preponderance of the evidence standard of review when deciding a denial of a WGPI [within-grade pay increase] case. On its face, petitioner's argument has validity. Section 4303 does not expressly address itself to an agency's refusal to increase an employee's pay. Also section

> 5335 is not, according to the statute's phrasing, directly linked to the substantial evidence standard of review stated in section 7701(c)(1)(A). Therefore, the mechanics of section 7701(c)(1) would seem to place a denial of a WGPI within subsection B -- "any other case."

The *Meyer* court maintained, however, that Congress' plain intent -- as reflected in the CSRA's plain language not including within-grade appeals in review under the substantial evidence standard, 5 U.S.C. § 7701(c)(1)(A) -- was merely a "statutory lapse." *Id.* at 542. So, it substituted its own judgment for that of the Legislature and wrote new law. Henceforth, within-grade appeals under 5 U.S.C. § 5335(c) would be governed by the substantial evidence standard which the CSRA in § 7701(c)(1)(A) had made applicable only to § 4303 cases. The court justified its excursion into the legislative arena by claiming that any

other result (i.e., the one Congress had provided) was "absurd," *id.* at 544; and that the result achieved by the court was more in keeping with the CSRA's "general scheme." *Id.* at 542.

The Federal Circuit later rubber-stamped *Meyer* without analysis in *Romane v. Defense Contract Audit Agency*, 760 F.2d 1286 (Fed. Cir. 1985). In *Romane*, the court below said only that (a) it was bound by an internal management rule to follow the precedents of the old Court of Claims, (b) no Federal Circuit judge requested *en banc* consideration of the *Meyer* precedent (as required by court rules to overturn precedent), and (c) the panel was convinced of the correctness of the *Meyer* decision. While admitting that the three other Circuits deciding the question had reached contrary results in *Ommaya*, *White*, *Stankis* and *Schramm*, *id.* at 1288, neither the *Romane* panel nor the panel in this

case attempted to consider, much less refute, the strong criticism of *Meyer* by the Fifth Circuit in *Stankis*, 713 F.2d at 1184, and the Third Circuit in *Schramm*, 682 F.2d at 89.

In the case before this Court, the Federal Circuit has again unthinkingly adhered to the *Meyer* precedent that is plainly contrary to statute. 5 U.S.C. § 7701(c)(1). The panel deciding the instant case said only that it had "no authority ... to overrule a precedent," App. A at 3a, and then, when petitioner suggested rehearing *en banc*, the Circuit declined to rehear the case without giving a reason, App. D at 60a.

C. The Question Presented Here Has Wide-Ranging Importance for the Administration of the Federal Civil Service and Protection of the Rights of Government Employees.

This Court has enunciated that the Federal civil service appeal system[11] "provides *meaningful remedies* for employees who may have been unfairly disciplined...." *Bush v. Lucas*, 462 U.S. 367, 386, 103 S.Ct. 2404, 2415, 76 L.Ed. 648, 662 (1983) (emphasis added). It has recognized that Congress, in the CSRA, has adopted "exacting standards" for review of agency personnel decisions by the MSPB and for sustaining those decisions only when they are "supported by appropriate evidence," quoting the two standards of review set forth in 5 U.S.C. § 7701(c)(1).

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11 The Court's reference in *Bush* was to the civil service laws and regulations in effect prior to the Civil Service Reform Act of 1978, which it said were "substantially similar to those now in effect ..." under the CSRA. 462 U.S. at 386, 103 S.Ct. at 2415, 76 L.Ed. at 662.

Lindhal v. Office of Personnel Management, ___ U.S. ___, 105 S.Ct. 1620, 1624, 84 L.Ed.2d 674, 681 (1985); *Cornelius v. Nutt*, ___ U.S. ___, 105 S.Ct. 2882, 2884-85 (1985).

Here, we do not just have an isolated case of unlawful decision-making by the Federal Circuit and the MSPB. More than two million civilian Federal employees receive within-grade increases. Approximately 1,000 appeals of denied within-grade increases have been decided by the MSPB in its brief, seven-year history.[12] Moreover, the within-grade cases of Federal employees covered by collective bargaining agreements, which are decided by arbitrators and not the MSPB, are now presumably go· :rned by the MSPB's standard of review, bas d upon this Court's holding

12 According to the MSPB, 918 within-grade appeals were decided between Fiscal Year 1980 (beginning October 1, 1979) and Fiscal Year 1984 (ending September 30, 1984).

last year in *Cornelius v. Nutt*, *supra*, that arbitrators must apply the MSPB's "harmful error" rule. The standard of review is thus very important for both the administration of within-grade pay raises received by more than two million Federal employees and the proper adjudication of perhaps 300 appeals each year.

By using a lower standard of review in within-grade appeals than Congress expressly provided and intended, the MSPB is failing to carry out its statutory authority in a whole class of cases.[13] It is failing to implement the "meaningful remedies" for aggrieved employees (*Bush v. Lucas*, *supra*) in their within-grade appeals that Congress decreed in "a comprehensive revision of the laws governing the

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13 The MSPB reviews seven distinct classes of cases, among them, within-grade appeals. The other six classes are adverse action, disability retirement, reduction-in-force, termination of probationary employees, non-disability retirement, and performance.

rights and obligations of civil servants...." *Cornelius v. Nutt*, *supra*, 105 S.Ct. at 2884-85, *citing Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 91 [104 S.Ct. 439, 441] (1983).

These failures go to the very heart of the MSPB's statutory mission because Congress' purpose in creating the MSPB, in place of the old U.S. Civil Service Commission's Federal Employee Appeals Authority and Appeals Review Board, was to give more power and independence to the adjudicatory body deciding Federal employee appeals. Congress declared in the CSRA's findings and statement of purpose that

> [i]t is the policy of the United States that --
>
> (1) in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of

> public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices; ...
>
> (3) Federal employees should receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees....

5 U.S.C. § 1101 note. The merit system principles, enacted in the CSRA and found in 5 U.S.C. § 2301(b), mean at minimum that all Federal employees "should receive fair and equitable treatment in all aspects of personnel management." *See* 5 U.S.C. § 2301(b)(2); *Wilburn v. Department of Transportation*, 757 F.2d 260, 262 (Fed. Cir. 1985). Since "the linchpin of federal personnel management is fairness" (*Wilburn, supra*), the MSPB is charged with providing "appropriate protection" to aggrieved Federal employees (5 U.S.C. § 1101 note, *supra*) who complain against unfair,

erroneous personnel decisions of their agencies.

Application of an erroneous, low evidentiary standard, weighted against Federal employees and in plain contravention of Congress' intent (*see supra* at pp. 11-16) denies "fair and equitable treatment" and "appropriate protection." As a practical matter, the lower standard means rubber-stamping of the agency decision in within-grade appeals. As the D.C. Circuit noted in *White*, *supra*, "the presiding official did little more than use such words as 'proven,' 'shown,' and 'clearly established' in evaluating the evidence." 720 F.2d at 210. The aggrieved employee's within-grade appeal gets only a cursory

look (and a written negative decision) from the MSPB presiding official.[14]

Here the MSPB -- in conflict with both the statutory standard, 5 U.S.C. § 7701(c)(1), and its own regulations governing within-grade appeals, 5 C.F.R. § 1201.56(a) -- is abrogating its power, avoiding its responsibility and refusing to adhere to the only construction of the CSRA that would carry out the statute's purpose and intent. *See* 5 U.S.C. § 1101 note (*supra* at pp. 27-28). The MSPB has not even submitted proposed legislation to Congress to change the statutory standard

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14 Recognizing this fact and citing *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), the D.C. Circuit in *White*, *supra*, remanded the employee's case for a new hearing which would properly apply the preponderance of the evidence standard. 720 F.2d at 210-11. That Circuit followed the same position in *Ommaya*, *supra*, despite the government's invitation to the court to invoke the "harmless error" rule. 726 F.2d at 830. The *Schramm* and *Stankis* cases were also remanded to the MSPB for a new hearing. 682 F.2d at 91; 726 F.2d at 831.

of review providing for preponderance of the evidence in within-grade appeals, as set forth in 5 U.S.C. §§ 7701(c)(1), 5335(c), 4303.

At stake in within-grade appeals are fundamental rights and interests affecting the more than two million Federal employees eligible to receive such pay increases. The constitutionally-protected, due process right of public employees to retention of their public employment, *see Cleveland Board of Education v. Loudermill*, ___ U.S. ___, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), logically includes such important incidents of that employment as the within-grade pay increases that Congress provides by statute in 5 U.S.C. § 5335 It is for this reason that by law Federa employees may challenge a denied within-grade increase not only in a formal reconsideration prior to the agency's issuance of a final within-grade

decision, but also in an administrative hearing before the MSPB with all the procedural protections of the Administrative Procedure Act, 5 U.S.C. §§ 554-557, and review by a United States Court of Appeals. *Compare Cleveland Board of Education v. Loudermill*, *supra*; 5 U.S.C. § 5335(c). If the decision below stands, those due process rights, carefully guaranteed by Congress, will be eroded to little more than paper.

In addition to important property rights, within-grade denials involve, as the dissenting judge in this case aptly observed, "preserving intact a person's treasured reputation." App. A, 9a. There can be no doubt about the stigmatizing effect on a Federal employee whose within-

grade increase is denied.[15] *See Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971); *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216 (1952); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951); *United States v. Lovett*, 328 U.S. 303, 316-17, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252 (1946). *See also Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707 (1972). The harm that can be thus done to an employee's reputation calls for the most careful review by the MSPB -- using its highest standard (preponderance of the evidence) in within-grade cases.

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15 A permanent record showing the within-grade denial is placed in the Federal employee's official personnel folder, which is in turn available to personnel office staff, the employee's supervisor and prospective employers. Coworkers are certain to find out about the employee's within-grade denial.

Evidentiary standards do make a difference in the decision of cases. Here, the substantial evidence standard, as normally applied by the MSPB, was outcome-determinative. At the time of her within-grade denial, petitioner's existing annual performance evaluation was a "satisfactory" on the high end of the scale (as agency management admitted); and her very next annual performance evaluation after the denial was "fully satisfactory." Petitioner thus had "satisfactory" evaluations directly before and after the denied within-grade increase -- and no evaluation in between, to support the within-grade denial. All along the way, administrative and judicial decision-makers assessed petitioner's performance as adequate to meet the standard. The MSPB presiding official who conducted the hearing found that petitioner's "coworkers expressed a consistent opinion as to the

high quality and volume of [petitioner's] work...." App. B, 33a. Recapping the undisputed testimony of petitioner and her four coworker witnesses, the presiding official wrote that petitioner "produced a great deal of work and that her failure to meet deadlines was due to her heavy workload;" that her "work was of exceptional quality, ... [she] is often at work 14-15 hours a day and on weekends, ... and [she] produces a "herendous [sic] amount of work;" that "she has an inordinate amount of work" and "serves on a large number of committees;" that she "had a heavy workload" and "there were frequent delays in acquiring the information needed to produce many of their products." App. B, 29a-33a. Federal Circuit Judge Nies, in dissent, agreed with the presiding official and found that the agency's denial was not even supported by substantial evidence:

> From my review of the entire record, I conclude that the denial of Dr. Marques' within-grade increase was unjustified. The record shows that Dr. Marques was a valuable and dedicated professional with an outstanding 35 year career, who worked long hours to produce what the board found to be high quality work reflecting an extremely thorough approach.
>
> * * *
>
> The unsatisfactory rating by [supervisor] Steinberg smacks of "I'll show her who's boss," not, in fact, unsatisfactory work.

App. A, 8a, 9a, 11a. Notwithstanding this high assessment of petitioner's quality and quantity of work, the decision-makers below (except for Judge Nies) were constrained by the substantial evidence stan-

dard from reviewing and reversing the agency decision.[16]

This case therefore points up the Federal Circuit's nullification in a whole class of MSPB cases of the "meaningful remedy" (*Bush v. Lucas*, *supra*) and the "exacting standard" of review (*Lindhal v. Office of Personnel Management*, *supra*) that Congress provided for the purpose of ensuring "appropriate protection" of Federal employees by the MSPB (5 U.S.C. § 1101 note, *supra*) and "fair and equitable

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16 The presiding official felt obliged to give more weight to petitioner's two most recent supervisors who testified for the agency, rather than petitioner's five witnesses at the hearing. App. B, 33a. Thus, the presiding official ignored the fact that petitioner's "I'll-show-her-who's-boss" supervisor had "fail[ed] to comprehend the complexity of [an assigned] report" an had given petitioner "successive eadlines [that were] ... entirely unre sonable," dissent of Judge Nies, App. A, 13a, 10a, 9a, and the fact that petitioner's past supervisor "modified his testimony during the hearing ... [and] explained that he did not remember the events." MSPB Final Opinion and Order, App. C, 48a.

treatment in all aspects of personnel management" by Federal agencies (5 U.S.C. § 2301(b)(2); *Wilburn v. Department of Transportation*, *supra*). Given the importance of the question presented here to Federal personnel administration, the civil service appeal system, as well as to petitioner and the hundreds of Federal employees whose within-grade increases are denied each year, this Court should review the standard of review in within-grade cases promulgated by the Federal Circuit in plain contravention of Congress' intent as expressed in the statute and in conflict with all other Federal Circuits deciding the question.

CONCLUSION

For these reasons, we request that the Court issue a writ of certiorari to review the judgment and opinion of the Federal Circuit.

Respectfully submitted,

JOSEPH D. GEBHARDT
(Attorney of Record)
BETH LOEWENSTEIN DON
Dobrovir & Gebhardt
Suite 1105
1025 Vermont Ave, N.W.
Washington, D.C. 20005
(202) 347-8118

March 3, 1986

Counsel for Petitioner

APPENDIX A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

M. GILDA MARQUES,	)	
	)	
Petitioner,	)	
	)	
v.	)	Appeal No. 85-607
	)	
DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	

DECIDED August 1, 1985

Before BENNETT, Circuit Judge, NICHOLS, Senior Circuit Judge, and NIES, Circuit Judge.

PER CURIAM.

DECISION

M. Gilda Marques appeals the final decision of the Merit Systems Protection Board, 22 M.S.P.R. 129 (1984), which upheld the denial of her within-grade pay increase by the Department of Health and Human Services (HHS). We affirm.

OPINION

Marques is a medical officer for the National Institute of Neurological and Communicative Disorders and Stroke, National Institutes of Health, HHS. On February 8, 1982, HHS denied her within-grade increase from step 9 to step 10 on the basis that her performance was not at an acceptable level of competence. *See* 5 U.S.C. § 5335(a)(3)(B) (1982). This negative determination was sustained upon reconsideration.

On appeal, the presiding official, after a hearing, affirmed the agency

action, properly applying a substantial evidence standard of review. *See Romane v. Defense Contract Audit Agency*, 760 F.2d 1286, 1288 (Fed. Cir. 1985). Petitioner asks the panel to overrule this and other precedents, but we have no authority to do so. Only the court in banc can overrule a precedent and that request was declined in *Romane*.

Marques' former and present supervisors testified as to her lack of timeliness in meeting workload requirements and the resultant low level of productivity. While there was contradictory testimony by several of Marques' co-workers, it was not improper for the presiding official to find that the supervisors were in a more competent position to evaluate Marques' job performance. Furthermore, the presiding official's decision to believe the supervisors was a credibility assessment

well within her discretion. *Griessenauer v. Department of Energy*, 754 F.2d 361, 364 (Fed. cir. 1985). We defer to her judgment in this regard and conclude that there is substantial evidence to support her decision. *See* 5 U.S.C. § 7703(c) (1982). *Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984) (discussing scope of review). The opinion of the board on petition for review agreed with its presiding official.

Marques takes issue with the decisions of the presiding official and the board on several grounds, essentially rearguing the facts as well as the law. First, we reject petitioner's claim of error that the presiding official abused her discretion in refusing to admit in evidence four photographs submitted by Marques. These pictures were neither relevant nor material to the basic

question of Marques' level of competence. *See* 5 C.F.R. § 1201.62(a) (1982). Second, Marques' Performance Plan for the period October 30, 1981 to December 31, 1982, which she signed, sufficiently informed her of the specific performance requirements necessary to attain an acceptable level of competence. Prior to October 30, 1981, these requirements were communicated to her by the use of her position description. Because Marques was adequately notified there was no need to warn her, as she claims should have been done, of the impending denial of her within-grade increase under 5 C.F.R. § 531.409(b). *See also* FPM Letter 531-55 ¶ 3A(1) (October 1, 1981). Third, we are satisfied that the evidence relied upon by the presiding official and the board collectively covered Marques' entire 156-week waiting period, and

therefore the cases cited by Marques, *Bergman v. Department of Health & Human Services*, 4 MSPB 452 (1980), and *Koenig v. Office of Personnel Management*, No. DC531D09015 (MSPB February 19, 1980), are inapposite. Finally, the presiding official properly refused to consider Marques' allegation that HHS committed a prohibited personnel practice by giving her an official reprimand in direct response to her appeal of the denial of her within-grade increase. Even if this allegation were true, it would not be relevant to the issue of her level of competence and therefore would not be harmful error. The board's affirmance of the agency action was not based on this matter and thus was not in conflict with 5 U.S.C. § 7701(c)(2)(B). Petitioner did not contend that the denial of her in-grade increase, which she appealed, resulted from agency

retaliation, only that a reprimand resulted from the appeal.

We do not find it necessary to reach other allegations of petitioner. Under our scope of review as defined by 5 U.S.C. § 7703(c),there is an insufficient basis for reversal of the board. *Brewer v. United States Postal Service*, 647 F.2d 1093, 1096 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1144 (1982).

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

M. GILDA MARQUES, Petitioner,	)	
v.	)	Appeal No. 85-607
DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	)	

NIES, Circuit Judge, dissenting-in-part.

From my review of the entire record, I conclude that the denial of Dr. Marques' within-grade increase was unjustified. The record shows that Dr. Marques was a valuable and dedicated professional with an outstanding 35 year career, who

worked long hours to produce what the board found to be high quality work reflecting an extremely thorough approach. This appeal has little to do with money (she received a raise 12 months later) but with preserving intact a person's treasured reputation.

Although Dr. Marques failed to submit the National Institute of Drug Abuse report within the successive deadlines established by her supervisor Steinberg, each deadline was shown by evidence of record to be entirely unreasonable. No reasonable deadline was ever set. Indeed, it was admitted that the report would have taken three to four weeks if she had done nothing else. No particular priority was directed to be given the NIDA report over other work, nor was she relieved of her previous assignments. Rather than reflecting poorly on her, the circumstances

surrounding the NIDA report indicate Steinberg's failure to comprehend the complexity of the NIDA report, which could not be updated in the short time he allotted because of inadequacies in the data base of the prior report which were not apparent until she began her work. With characteristic dedication, Dr. Marques had undertaken the assigned project, taking over from someone else who was unable to get it done, and within three months produced a vastly improved report over that of the prior year, while continuing with her other work. There was no showing that the report did not meet the actual needs of the agency with respect to timeliness, nor that the delay was undue under the entire circumstances. She cannot be held responsible for her new supervisor's inaccurate assessment of the scope of this project as well as of

her other responsibilities, including preparation of an annual report of two bound volumes. At most she failed to keep her supervisor advised of the problems encountered with the NIDA report which required additional time to correct. The unsatisfactory rating by Steinberg smacks of "I'll show her who's boss," not, in fact, unsatisfactory work.

Finally, while the board said that it was considering Dr. Marques' work over the entirety of a three-year evaluation period, the board's decision is supported by substantial evidence only if one looks at the events in the last three months of the evaluation period. Over the entirety of the period her work effort was prodigious. Not until the very end of that period, when the new supervisor Steinberg entered the scene, does it appear that any serious

criticism of her work had ever been made to her. The testimony of her former supervisor Dr. Shakhashiri that he sometimes had problems of untimeliness, in context, can mean no more than that his evaluation of her work in this respect was at the level of "usually met but rarely exceeded requirements" (i.e. satisfactory) rather than at the next higher level "exceeded requirements." (*See* Performance Rating dated December 15, 1980.) His overall evaluation in 1980, specifically confirmed as accurate, was not perfunctory but concluded with the following comments:

> Gilda the other medical professional at OPA is dedicated professionally, bureaucratically and in the civic sense. She views her tasks within the context of the role as a civil servant who earns taxpayer salary for the public good. She is trying [illegible] to learn how to compromise her zest for quality performance, for the sake of multitask usefulness

> and involvement. Her meticulous attention to the Annual Report would leave her imprint of quality on [illegible] model.

Accordingly, I would reverse the denial of Dr. Marques' within-grade increase, as not supported by substantial evidence.

APPENDIX B

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

M. GILDA MARQUES	
v.	CASE NO: DC531D8210848
	DATE: AUG 20 1982
DEPARTMENT OF HEALTH AND HUMAN SERVICES	

INTRODUCTION

On April 21, 1982, appellant filed a petition for appeal from a reconsideration decision of the Department of Health and Human Services sustaining a negative determination of acceptable level of competence and denial of within grade salary increase.

JURISDICTION

Pursuant to the provisions of 5 U.S.C. §5335, employees in permanent general schedule positions are entitled to a periodic within-grade step increase if their work is "of an acceptable level of

competence." An agency determination that an employee's work is not of an acceptable level of competence is appealable to the Board, providing the employee first exhaust the right to secure an administrative reconsideration of the decision within the agency under uniform procedures prescribed by the Office of Personnel Management. *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980).

The appellant is an employee who occupies a permanent position subject to the General Schedule and whose within grade increase was denied. The appellant requested reconsideration of the decision which denied her within grade increase, and the reconsideration decision was negative. 5 U.S.C. 5335(c); 5 C.F.R. 531.410(d). I find, therefore, that the appeal is properly before the Board for adjudication.

ANALYSIS AND FINDINGS

Appellant is employed as a Medical Officer, GS-602-12, Step 9, for the National Institute of Neurological and Communicative Disorders and Stroke (NINCDS), National Institute of Health, Department of Health and Human Services (agency). By letter dated February 8, 1982, appellant's supervisor, Dr. Louis M. Steinberg denied the appellant's within grade increase after finding that her work was not of an acceptable level of competence. Appellant completed the 156 calendar week period for advancement to step 10 on February 7, 1982.

Appellant requested reconsideration, and by letter dated April 1, 1982, Richard L. Sherbert, Jr., Executive Officer, NINCDS, sustained the negative determination. It is from that

reconsideration decision which the appellant now appeals.[1/]

The burden of proof in this case is upon the agency. 5 U.S.C. §7701(c)(1); 5 C.F.R. 1201.56(a)(1). The Board has determined that the appropriate standard of proof to be borne by the agency in this type of case (referred to as an ALOC case) is substantial evidence, rather than preponderance of the evidence. *See Parker v. Defense Logistics Agency*, 1 MSPB 489, 504 (1980); *Meyer v. Department of Health and Human Services*, 666 F.2d 540

1/ Appellant requested and was afforded a hearing on June 30, July 1, 1982.

(Ct.Cl.1981).[2/] Substantial evidence is defined by the Board's regulations as:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true. "5 C.F.R. 1201.56(c)(1)".

The Board has amplified this definition in *Parker*, *supra*, at 509:

> The substantial evidence standard requires only evidence of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions.... It obliges the presiding official to determine only whether, in light of all the relevant and credible evidence before the Board, a reasonable person could agree with the agency's

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2/ In *Schramm v. Department of Health and Human Services*, No. 82-2144 (decided June 28, 1982) the court of Appeals for the Third Circuit disagreed with *Parker* and *Meyer* and held that the standard of proof is preponderance of the evidence in a case involving denial of a within grade increase. However, the Board has not adopted the Third Circuit's holding in *Schramm*, and thus, the substantial evidence standard is being applied to this case.

> decision (even though other reasonable persons, including the presiding official might disagree with that decision).

Thus, the substantial evidence standard precludes the Board's presiding official from substituting his or her own judgment for that of the agency. Rather, my inquiry is restricted to a determination of whether a "reasonable person could agree with the agency's decision" even though others, including myself might disagree. Id.

In the letter of February 8, 1982, which denied the appellant's within grade increase, appellant's supervisor, Mr. Steinberg stated that the appellant's work performance was unacceptable in the following respects: (1) Planning and organizing work and setting priorities reflective of Office and Institute Policy (Critical Element); and (2) Working effectively within the

immediate organization and with various staff offices at NIH (Noncritical Element).3/

Specifically, the first charge against the appellant stated that assignments or tasks given to the appellant are frequently not completed in a timely manner, and gave as examples the analysis which the appellant performed based upon a request from the National Institute of Drug Abuse (NIDA),4/ and an

3/ Mr. Steinberg stated that appellant's work performance was evaluated in light of the new Employee Performance Management System for her position which was given to her on October 30, 1981.

4/ Mr. Steinberg stated that the NIDA project was assigned to the appellant on October 2, 1981 with a due date of October 13, 1981. Mr. Steinberg further stated that the assignment was not completed, nor was he informed of the reasons for the delay, and that when he asked the appellant for a status report on October 14, 1981 she informed him that she had not had time to begin the project. Appellant was then allegedly given two subsequent deadlines, first for October 22, 1981 and then December 18, 1981. The project, however, was not completed until January 12, 1982.

assignment given to the appellant to respond to a National Science Foundation (NSF) request for information to be included in its Fourth Annual Science and Technology report.5/ In support of this charge, appellant's supervisor also stated that the condition of appellant's office (filled to overflowing with outdated and unnecessary materials) had made it impossible for her to use her office; that repeated oral and written requests regarding the condition of her office were not followed; that the time it has taken to accomplish turning the office into a proper work station has necessitated his assigning appellant's work projects to others in the Section,

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5/ In regard to the NSF assignment appellant allegedly informed her supervisor that she did not feel able to generate the material and that she was a GS-12 Medical Officer (rather than a higher grade) in order not to be required to perform the duties (although she ultimately completed this assignment).

and that appellant's frequent late arrivals have further disrupted her work activities and are a hindrance to her being able to organize and plan her work priorities.

In support of the second charge against the appellant, Mr. Steinberg stated that appellant failed to work effectively within the immediate office by not, despite his numerous requests, keeping him adequately informed of the progress of her work on the annual report. Mr. Steinberg stated that appellant was requested to provide dates that incoming segments of the Annual Report are received from various parts of the Institute along with dates by which she reviewed and processed such material. Mr. Steinberg also cited another incident in support of this charge in which the appellant allegedly openly criticized a staff member of

another office (OPA), which he contended detracted from the image of the Office and was counter productive to achieving optimal working relationships.

In rendering the reconsideration decision of April 1, 1982, Mr. Sherbert excluded consideration of the incidents involving the NSF report and the charge that she allegedly openly criticized a staff member in OPA.[6/] Nor did Mr. Sherbert consider the matter concerning the condition of the appellant's office, finding the matter to be more relevant to discipline and responsiveness to supervisory instructions that to appellant's performance. Mr. Sherbert

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6/ Mr. Sherbert determined that since each of these incidents involved verbal exchanges, and were described in substantially different terms by the parties involved, he was unable to determine objectively which version is more correct. Furthermore, Mr. Sherbert determined that these incidents appeared to be individual situations which reflect no pattern of actions which affect appellant's performance.

determined, however, that appellant's lack of timeliness in meeting workload requirements and the resultant low level of productivity constituted a failure to achieve an acceptable level of competence sufficient to warrant a within-grade increase, and concurred in her supervisor's denial.

Mr. Sherbert stated in the reconsideration decision that the totality of appellant's performance both under Dr. Steinberg (from July 1, 1981 to February 8, 1982) and her former supervisor Dr. Shakhashiri (who served as the appellant's supervisor for the part of the waiting period since her last within grade increase until July 1, 1981) was considered. Mr. Sherbert concluded from his discussions with the appellant, Dr. Steinberg and Dr. Shakhashiri that although the appellant is devoted to producing very high quality reports and

work products (which he contends is achieved through very detailed considerations by the appellant of the objectives of a project and by broadening the originally intended scope and detail which she pursues in completing the project), the resulting improvement in the quality of the project is often not justified due to delays caused by an unnecessarily slow and detailed work pace, which results in missed deadline often by large margins. Mr. Sherbert cited as an example appellant's performance concerning the NIDA project as stated in the denial letter.

In her petition for appeal, appellant argues that: (1) given her other responsibilities, her work in preparing the Congressionally mandated (P.L. 95-461) National Institute for Drug Abuse (NIDA) report was completed in as timely a manner as was necessary to produce the

quality report expected by Congress and the White House; (2) in general, her work is timely and her level of productivity is not low; the effort and care that she puts into her work is necessary to meet the task at hand; (3) the large quantity of overtime that she devotes to her job was not considered in the agency's denial of her within grade increase; and (4) the denial of her within-grade increase was based on her new supervisor's seven month review, and not on the three year period that was necessary.

I have considered the arguments and evidence submitted by both parties regarding the appellant's performance during the 156 week waiting period. In particular, I have reviewed the multitude of work products submitted by the appellant in an attempt to show the quality and length of time required for

completing the assignments which she performed. I have also carefully considered the extensive testimony given at the hearing regarding the appellant's performance.

Dr. Steinberg, appellant's supervisor testified that the difficulties which the appellant allegedly experienced on the NIDA project in no way justified the resulting delay in its completion, nor was the Annual Report a reasonable excuse for the untimely completion of the NIDA project. Dr. Steinberg further testified that the first deadline given the appellant was "feasable" but "difficult," but that it could have been completed in 3 or 4 weeks even in light of the problems concerning the project which the appellant experienced. He also testified that appellant was told that the NIDA had a very tight deadline, and that she was to put her major

attention and primary effort into it, and that no major projects (other than the annual report) were assigned to the appellant between the NSF project and the NIDA report. Dr. Steinberg further testified that he was the appellant's immediate supervisor, and that no one else had the authority to give the appellant any assignments directly.

Dr. Zekin A. Shakhashiri testified that when he supervised the appellant, she produced quality work, although he was not satisfied with the timeliness of her submissions. Dr. Shakhashiri stated that the appellant's submissions were often filled with unnecessary and meticolous detail beyond that which was necessary, and that she had a tendency to do what she thought was necessary rather than relying on his advise. Dr. Shakhashiri further testified that the performance appraisal which he gave the

appellant on December 15, 1980 was accurate, but that if he had rated her from December 15, 1981 to July 1, 1981, he would have lowered his appraisal in the categories of "Quantity and Timeliness of Work products", "Adaptability/Flexibility" and "Planning, Organizing and Setting Priorities".7/

Appellant testified that she produced a great deal of work and that her failure to meet deadlines was due to her heavy workload. Specifically, in regard to the NIDA project, she testified she was never expressly made aware that it was supposed to be a top priority assignment, and that in November of 1981, she called the contractor concerning the NIDA project, at which

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7/ *See* appellant's Performance Appraisal dated December 15, 1981, in "Appellant's Documents to be Discussed and/or Introduced at the Hearing" at Tab 12.

time she was told that the contracting agency had so much work at the time that they would not be getting to the report for quite some time. Appellant admitted, however, that although she did notify Dr. Steinberg that she was having "definitional problems" with the NIDA project on October 14, 1981, she could not recall whether she notified him when she found that she would not make the subsequent deadline dates that were arranged.

Charles L. Rice, a co-worker of the appellant, testified that appellant's work was of exceptional quality, that appellant is often at work 14-15 hours a day and on weekends, that he often confers with the appellant regarding reports for one of the agency's computer systems(CRISP), and that appellant produces a "herendous amount of work." Mr. Rice also stated that he reviewed

much of the appellant's work that was in the computer system which she performed prior to his arrival at the agency in July of 1980.

William Holliman, a co-worker of the appellant, who works in the Division of Research Grants testified that he has worked on several projects with the appellant, that the appellant serves on a large number of committees and that she has an inordinate amount of work.

Thelma Martin, a co-worker of the appellant, who works in the same section testified that in her opinion, appellant is a professional employee (as opposed to a clerk) and that you therefore cannot measure her productivity. Ms. Martin also testified that establishing deadlines in her office are a problem because you have to know what the work will entail. Ms. Martin also testified that she does not feel she was

overburdened as a result of the appellant having missed deadlines. Ms. Martin also testified that she does not always meet the deadlines for her assignments, but that when she finds she is going to miss a deadline, she informs her supervisor.

Cynthia Greenblat, a former section chief in OPA (until February 1982) testified that appellant had a heavy workload and that some of her deadlines dates were missed. Ms. Greenblat also testified that there were frequent delays in acquiring the information needed to produce many of their projects, and that it was a very frequent occurrence that deadlines had to be renegotiated.

Based on my review of all the evidence regarding the appellant's performance during the total 156 calendar work week period in question, I find that although

it is apparent that appellant's work products are of a high quality reflecting an extremely thorough approach, the agency has established by substantial evidence that appellant's lack of timeliness in meeting her workload requirements and resultant low level of productivity in the office constituted a failure to achieve an acceptable level of competence sufficient to warrant a within grade increase. I note in particular, that although the testimony of the appellant's coworkers expressed a consistent opinion as to the high quality and volume of the appellant's work, I find that the appellant's present and former supervisors were in a more competent position to evaluate the "timeliness" of those work products, the sufficiency of the appellant's communications to them in situations where she found that

meeting a specific deadline would not be possible, and the amount of work that she could not be assigned as a result of her shortcoming.

AFFIRMATIVE DEFENSES

The appellant has also raised several affirmative defenses. The Board's regulations provide that the appellant has the burden of proof here. 5 C.F.R. 1201.56(b).

Appellant alleges that the agency committed harmful error by failing to inform her of the specific performance requirements constituting an acceptable level of competence and by giving her no warning of the impending WGI denial required under 5 C.F.R. 531.408(b) and 531.409(b). The record shows, however, that the appellant was informed of the specific performance requirements that constitute an acceptable level of competence once an appraisal system for

her position was established under 5 C.F.R. 430.203. *See* Appellant's Performance plan for the period of October 30, 1981 to December 1982. Prior to October 30, 1981 appellant's performance requirements were communicated to her by the use of her position description, which the Board has held is an acceptable means for evaluating performance. *See Hurt v. Department of Health and Human Services*, 3 MSPB 507 (1980), and 5 C.F.R. 531.408(c). Consequently, I do not find that 5 C.F.R. 531.409(b) is applicable to the appellant in this instance.

Moreover, I find that the reconsideration official did consider the appellant's performance during the entire 152 week waiting period, and not just the period in which she was supervised by Dr. Steinberg.

Appellant also alleged at the hearing that the agency's action denying her within grade increase was based on age discrimination. The Age Discrimination Employment Act of 1976, 29 U.S.C. 621 *et seq* prohibits discrimination on account of age in federal government employment.

According to *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), the criteria to establish a prima facie case vary according to the factual situation. Criteria which can be used in determining whether a prima facie case of age discrimination existed in this case is that: (1) the appellant was within the protected age group; (2) she was otherwise qualified for the within-grade salary increase; and (3) despite appellant's qualifications, her within-grade salary increase was denied. *See East v. Romine, Inc.*, 518 F.2d 332 (1975).

The only evidence presented by the appellant regarding her discrimination allegation is that a younger employee, a Ms. Hadley (approximately age 35 or 36) was granted a within grade increase who appellant contends was of poor quality. For the reasons articulated *supra*, I find that the appellant has failed to establish that she was otherwise qualified for a within-grade salary increase and that despite her qualifications she was denied her within grade increase. Accordingly, I find that appellant has failed to establish a prima facie case of discrimination in

connection with the denial of her within grade increase.[8/]

DECISION

The agency's action denying the appellant's within-grade increase is AFFIRMED.

NOTICE

This decision is an initial decision. It will become a final decision of the Merit Systems Protection Board on SEP 24 1982 unless a petition for review is filed with the Board within thirty-five

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8/ The appellant also alleged that the agency in this instance committed a Prohibited Personnel Practice by giving her an official reprimand dated May 28, 1982, in direct response to her appeal of the denial of her within grade increase to the Board. The agency objected to this issue being heard on the grounds that the action which the appellant was alleging resulted in a Prohibited Personnel Practice was subsequent, and thus, not relevant to the issue of whether the appellant's within grade increase was properly denied. The agency's objection was sustained based on the grounds as stated, and thus, the Prohibited Personnel Practice allegation was not considered in this appeal.

(35) calendar days after the date of this decision.

Any party to this appeal, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office of Personnel Management. 5 U.S.C. §7701(e)(2). The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be filed with the Office of the Secretary, Merit Systems Protection Board, 1120 Vermont Ave. NW., Washington, D.C. 20419, no

later than thirty-five (35) calendar days after the date of this decision. If a petition for review is filed, an informational copy of it should be forwarded to this office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

> (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
>
> (2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

The appellant has the right to petition the Equal Employment Opportunity Commission (EEOC) to consider the Board's final decision on the issue of discrimination, *either when this initial decision becomes final on the date set forth above or after final Board action when appellant has*

petitioned the Board for review or the Board has reopened the case on its own motion. The appellant [may file a civil action in] court *without either petitioning the EEOC or the Board or after either body has rendered a final administrative decision.* Either a petition or a civil action may be filed, *but not both,* no later than 30 days after the Board's decision has become final. Appellants who choose to file an action in a district court also have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs or security be waived.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of a final Board decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than

30 days after receipt of notice of the Board's final decision.

For the Board:

/s/ Michelle M. Hudson
Michelle M. Hudson
Presiding Official

APPENDIX C

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

M. GILDA MARQUES	)	
v.	)	DOCKET NUMBER DC531D8210848
DEPARTMENT OF HEALTH AND HUMAN SERVICES	)	

OPINION AND ORDER

The agency denied appellant's within-grade increase on the basis that her performance as a Medical Officer, GS-12, was not at an acceptable level of competence. Upon reconsideration, the agency sustained the negative determination.

Appellant then petitioned the Board's Washington Regional Office for appeal of the agency action. The presiding official sustained the denial, finding that the agency established by substantial evidence that appellant's

lack of timeliness and resulting low productivity constituted a failure to achieve an acceptable level of competence and warranted denying the within-grade increase. The presiding official also found that appellant failed to show that the agency committed harmful procedural error or discriminated against her on the basis of age. She declined to consider an allegation that the agency engaged in a prohibited personnel practice by reprimanding appellant in retaliation for filing the appeal with the Board.

In her petition for review, appellant contends that the presiding official made several errors in sustaining the

agency action.[1] Appellant asserts that the presiding official did not independently analyze the evidence, in that she repeated appellant's supervisors' allegations as fact while failing to assess their credibility. She also contends that the presiding official failed to consider all of the evidence, erroneously excluded certain photographs from evidence, and exhibited bias in favor of the agency.

We find appellant's argument to be without merit. The presiding official did not repeat the supervisors'

1/ Appellant also attempts to incorporate the closing brief and pre-hearing memorandum of law she submitted to the presiding official into her petition for review. Because these do not raise specific objections to the initial decision, they fail to meet the criteria for review established by 5 C.F.R. § 1201.115. *See Aistrup v. Department of Transportation*, MSPB Docket No. SF075281F2278 at 1, n.2 (November 15, 1983). Therefore, they will be considered only to the extent appellant cites them in objecting to the presiding official's rulings.

allegations as fact; rather, she merely summarized their testimony. Moreover, she specifically stated that she considered the arguments and evidence submitted by both parties regarding appellant's performance during the 156 week waiting period, reviewed the many work products submitted by appellant, and carefully considered the extensive hearing testimony. *See* Initial Decision (I.D.) at 5. Further, she stated that she reached her conclusion based on her review of all the evidence. *Id.* at 7. The presiding official's determination not to mention all of the extensive testimony and evidence does not mean that she did not consider it in reaching her decision upholding the agency action. *See Leonard v. U.S. Postal Service*, 3 MSPB 251 (1980); *Johnson v. General Services Administration*, 2 MSPB 220 (1980). Moreover, the presiding

official properly gave more weight to appellant's supervisors' testimony than to appellant's co-workers' testimony, because the supervisors could better determine whether appellant's lack of timeliness justified denying her within grade increase. *See Hug v. Department of the Army*, 9 MSPB 278, 279-80 (1982).

Similarly, we find that the presiding official did not err in finding appellant's supervisors' testimony credible. When questions of credibility are presented, the Board will accord due deference to the presiding official's assessment, because she was present to hear the witnesses' testimony and to observe their demeanor. *See Weaver v. Department of the Navy*, 2 MSBP 297, 299 (1980). Appellant asserts that Dr. Zekin Shakhashiri, her supervisor from the beginning of her waiting period until July 1, 1981, lied at the hearing

concerning appellant's report for the National Science Foundation (NSF). Although Dr. Shakhashiri modified his testimony during the hearing, he explained that he did not remember the events. The presiding official questioned Dr. Shakhashiri on his testimony, and we find nothing to indicate that she erred in determining that he was a credible witness. Moreover, although appellant attempts to discredit Dr. Shakhashiri by implying that he based his opinion of appellant's performance on the agency's action, Dr. Shakhashiri testified that appellant had problems with productivity and timeliness when he was her supervisor. *See* Testimony of Zekin Shakhashiri. Therefore, appellant's argument is without merit.

Appellant also contends that the presiding official erred in failing to

assess the credibility of Dr. Louis Steinberg, her supervisor from July 1, 1981, to February 8, 1982. Appellant has merely speculated, however, that because the presiding official did not mention Dr. Steinberg's testimony concerning appellant's work on the NSF and Annual Reports, she concluded that Dr. Steinberg's testimony was not credible. The agency did not consider appellant's performance relating to the NSF Report in its reconsideration decision, and therefore the presiding official understandably did not discuss the testimony on this point. *See* Agency File, Tab 27. Moreover, the regulations do not require the presiding official to respond to every theory and speculation presented by appellant. *See Leonard, supra*, at 252.

Appellant's contention that the presiding official erred in excluding

four photographs, taken in Dr. Steinberg's supervisor's office and offered to show management's operating style, is similarly without merit. A presiding official may exclude evidence if it is irrelevant. 5 C.F.R. § 1201.62(a). We find that the presiding official acted within her discretion in excluding the photographs because they clearly had no bearing on the issue of whether appellant's performance was at an acceptable level of competence.

We also find no merit to appellant's assertion that the presiding official was biased in favor of the agency. In making a claim of bias or prejudice, an appellant must overcome a presumption of honesty and integrity which accompanies administrative adjudicators. *In re Oliver*, 1 MSPB 368, 370 (1980). As noted, appellant has failed to show that the presiding official erred in

considering the evidence; nor has she presented other evidence to support her assertion. Therefore appellant's allegation of bias in this regard must fail.

Although appellant does not deny that she submitted the National Institute of Drug Abuse (NIDA) Project late, she contends that the presiding official erred in sustaining the agency action because her failure to complete the project on time was an insufficient basis for the action. Appellant cites two initial decisions by the Board to support her position. She also asks the Board to apply the higher preponderance of the evidence standard of proof to her appeal.

Even assuming that the preponderance of the evidence standard applies, we find that the agency established a sufficient basis for denying appellant's

within-grade increase. The initial decisions cited by appellant are not final adjudications and, therefore, are not binding on the Board. Moreover, the agency charged appellant with unacceptable performance in the critical element of planning and organizing work and setting priorities reflecting office and institute policy and the non-critical element of working effectively within the immediate organization and with various staff offices at the National Institute of Health. *See* Agency File, Tab 15. Although the agency discounted some of the specifications under these charges in its reconsideration decision, it left intact the decision that appellant failed to perform acceptably in the critical element, not only by submitting the NIDA project three months late and failing to keep her supervisor informed

of its status, but by forcing the agency to assign her work to others because she failed to timely complete her assignments and by frequently arriving late. It also did not disturb the decision that appellant failed to perform acceptably in the non-critical element by failing to keep her supervisor adequately informed on the progress of the Annual Report and by failing to implement the system requested by her supervisor to keep track of the dates on which she reviewed and processed material for the Annual Report. *See* Agency File, Tab 27.

Further, the presiding official considered appellant's assertions that her delays were justified and harmless. Appellant's mere disagreement with the presiding official's conclusions does not provide a basis for review by this Board. *See Weaver, supra,* at 298.

Therefore, we find that applying the higher preponderance of the evidence standard does not change the outcome in appellant's case. *See, e.g., Wade v. Department of Health and Human Services*, MSPB Docket No. DC531D8310393 at 2-5 (May 17, 1984).

Appellant also contends that the presiding official erred in finding that she failed to sustain her burden of proving her affirmative defenses against the agency action.

First, appellant asserts that the presiding official erred in failing to determine whether the agency committed a prohibited personnel practice by issuing her a reprimand after she appealed to the Board. We find, however, that the presiding official correctly refused to accept evidence on this issue because appellant did not contend that the action she appealed, the denial of her

within-grade increase, resulted from retaliation by the agency. Therefore, appellant has failed to show that the disallowed testimony adversely affected her substantive rights. *See Turner v. Department of the Army*, MSPB Docket No. AT07528110428 at 2 (October 15, 1982).

Next, appellant contends that the presiding official erred in concluding that the agency was not required to inform appellant in advance of the specific performance requirements for an acceptable level of competence or to give her advance notice of the impending within-grade increase denial. Appellant's argument is without merit. The presiding official did not find that the agency was not required to inform appellant of her performance requirements, but rather found that the agency had done so through appellant's performance plan and position

description. *See* I.D. at 7-8; Agency file. Appellant has presented nothing to show that the presiding official's conclusion was erroneous. Moreover, the presiding official correctly determined that because the agency had done this, it did not need to inform her of the impending denial under 5 C.F.R. § 531.409(b). *See also* FPM Letter 531-55-3A(1) (October 1, 1981).

Finally, appellant contends that the presiding official erred in finding that she failed to present a *prima facie* case of age discrimination. We find, however, that because the presiding official found that appellant failed to show that she was otherwise qualified for a within-grade increase, she properly determined that appellant failed to prove the elements of a *prima facie* case. *See* I.D. at 8. Therefore, appellant's argument is without merit.

We find, therefore, that appellant has failed to prove her affirmative defenses. 5 C.F.R. § 1201.56(2)(b)(1) and (2).

Accordingly, the Board DENIES appellant's petition for review for failure to meet the criteria set forth at 5 C.F.R. § 120..115.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision, with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed

with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e-5(f)-(k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver

of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

12 JUL 1984
(Date)
Washington, D.C.

/s/ Paula A. Latshaw
PAULA A. LATSHAW
ACTING SECRETARY

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

M. GILDA MARQUES, PETITIONER,	
v.	No. 85-607
DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing in banc be, and the same is hereby, Declined.

FOR THE COURT

/s/ Francis X. Gindhart

Francis X. Gindhart,
Clerk

December 2, 1985
Date

cc:Joseph D. Gebhardt
Ronald H. Clark